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September 24, 2004

EX PARTE PRESENTATION

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St. S.W.
Washington, D.C. 20554

Re: Recalculation and Refund Plan of the Sprint Incumbent Local Exchange Companies filed in connection with the 1993 Annual Access Tariff Filings, CC Docket No. 93-193 and the 1994 Annual Access Tariff Filings, CC Docket No. 94-65

Dear Ms. Dortch:

Pursuant to the Commission's July 30, 2004 Order in the above referenced proceedings, the Sprint Incumbent Local Exchange Companies ("Sprint") filed their Recalculation and Refund Plan ("Plan") on August 30, 2004. The Plan recalculated Sprint's 1992 and 1993 earnings and rates of return and resulting PCIs after applying the add-back adjustment. The Plan also calculated the resulting access rate decreases and resulting refunds with interest at the IRS rate for corporate overpayments in excess of $10,000 [26 U.S.C. § 6621(a)(1)(B)].

Only one party, AT&T, replied to Sprint's Plan and, with only one exception, AT&T endorsed Sprint's Plan completely. The one exception concerns the correct interest rate to be used for refunds. AT&T claims that rather than the refund rate for corporate overpayments in excess of $10,000, settled Commission policy dictates that the interest rate for corporate overpayments must be used.

AT&T claims that the Commission's decision in *GCI v. ACS*[1] established the following policy to determine which IRS interest rate applies to refunds: (1) the corporate underpayment rate applies when there is willful misconduct; (2) the corporate overpayment rate applies when the carrier has constructive knowledge that its tariff could be found unlawful; or (3) the rate for corporate overpayments that exceed $10,000 applies when the conduct is the result of miscalculation.

AT&T then argues that the second rate -- the corporate overpayment rate -- applies in the instant proceeding. AT&T claims that as of the 1993 Annual Access Filings the ILECs should have known that their tariffs would be declared unlawful because the add-back adjustment had always been an implicit part of the price cap sharing regime. AT&T claims that as of the 1994 Annual Access Filings the ILECs had constructive knowledge that their tariff could be unlawful because the 1993 Annual Access Filings had already been designated for investigation.

AT&T's reliance upon *GCI* is misplaced and its interpretation unsound. As to the former, *GCI* was a Section 208 Complaint case, not a Section 204 Tariff Investigation as in the instant proceeding. Secondly, *GCI* did not establish a policy of which IRS interest rate to use for refunds in any type of case – Section 208 or 204. Rather, the Commission in *GCI* recognized that interest on refunds is a matter "left to our sound discretion".[2] In short, the Commission is under no obligation to award interest, but can do so in its discretion based upon the facts and circumstances of each case. To the extent the Commission has a firm "policy" position on interest on refunds, Sprint believes it was set forth in the *LNP* Section 204 proceeding (involving refunds primarily to individuals, not corporations) where the Commission held "[I]n considering the appropriate interest rate to be assessed on this payment, the Commission adopted "the commonly held view that interest is not a penalty, but is simply the price that one pays for using another person's money."[3]

Even if AT&T is correct that *GCI* set the standard for what IRS rate to use for any refunds, Sprint believes AT&T's interpretation of *GCI* as applied to the instant proceeding is, simply put, wrong. AT&T claims that *GCI* stands for the proposition that

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[1] 16 FCC Rcd 2834 (2001) ("*GCI*").
[2] *Id. at* 2862.

[3] *In the Matter of Long-Term Telephone Number Portability Tariff Filings of Ameitech Operating Companies, Pacific Bell, Southwestern Bell Telephone Companies, and US West Communications, Inc.*, 14 FCC Rcd 17339, 17341 (1999), citing *In re Western Union Telegraph Co.*, CC Docket No. 78-97, 10 FCC Rcd 1741, 1748 (1995).

the IRS rate for corporate overpayments (as opposed to the rate for corporate overpayments that exceed $10,000) applies when the carrier "had constructive knowledge" that the tariff could be found unlawful...."[4] As noted above, *GCI* was not a Section 204 tariff investigation case. Rather, in *GCI* the Commission used the rate for corporate overpayments because it found that "ATU had at least constructive knowledge, ... that the Commission had rejected other carriers' attempts to assign ISP traffic to the intestate jurisdiction, and would similarly reject ATU's attempt."[5]

In other words, the Commission in *GCI* believed that ATU acted contrary to existing Commission precedent. That is simply not the case in the instant proceeding. Under the price-cap rules in effect when the 1993 and 1994 annual access tariffs were filed, there was no requirement for an add-back adjustment. This fact was confirmed by the Commission itself in its *Add-Back NPRM*[6] and by the DC Circuit Court of Appeals' decision[7] upholding the Commission's *1995 Add-Back Order*[8] that adopted an add-back adjustment prospectively, beginning with the 1995 Annual Access Tariff Filing.

It is true, as AT&T points out, that when Sprint made its 1994 Annual Access Filing, it knew that the 1993 Annual Access Filing was under investigation. However, such a tariff investigation is not tantamount to a Commission determination that a tariff is unlawful and cannot be construed to give a carrier constructive notice that it has done something wrong or inconsistent with past Commission precedent. The tariff investigation is a process to determine whether something is unlawful – there is no presumption of unlawfulness.

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[4] Reply Comments of AT&T Corp., September 13, 2004 at p. 4.

[5] *GCI* at 2863. Interestingly, the DC Court of Appeals remanded *GCI* on the constructive knowledge issue because it found that ATU's actions were before, not after the referenced Commission decisions on ISP traffic. *See* ACS of Anchorage, Inc. v. FCC, 290 F.3d 403 (DC Cir. 2002).

[6] *Price-Cap Regulation of Local Exchange Carriers, Rate-of Return Sharing and Lower Formula Adjustment,* Notice of Proposed Rulemaking, 8 FCC Rcd 4415 (1993) ("Add-Back NPRM").

[7] Bell Atlantic Telephone Company *et al.* v. FCC, 79 F.3d 1195, 1206 (DC Cir. 1996)("The sharing rules, including the add-back rule, are purely prospective.")

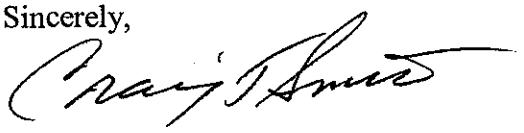
[8] *In the Matter of Price Cap Regulation of Local Exchange Carriers Rate-of-Return Sharing and Lower Formula Adjustment*, 10 FCC Rcd 5656 (1995) ("*1995 Add-Back Order*"),

In the absence of rules, which absence has been acknowledged by both the Commission and the DC Circuit Court of Appeals, Sprint's 1993 and 1994 Annual Access Filings were made in good faith and based, in Sprint's opinion, upon a sound legal basis. The fact that eleven years after the 1993 filing and ten years after the 1994 filing the Commission determined that other legal grounds were more persuasive does not change those facts.

Furthermore, the IRS rate for corporate overpayments that exceed $10,000 is the most logical rate to use where the interest is not a penalty. The vast bulk of the total refund amount, and certainly AT&T's refund, greatly exceed $10,000. Accordingly, the IRS rate for corporate overpayments that exceed $10,000 is consistent with the idea of paying a party for the use of their money, as opposed to extracting a penalty upon a party.

This letter is being filed electronically.

Sincerely,



Craig T. Smith

c: Tamara Preiss
Raj Kannan